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No. 84-1491

In the Supreme Court of the United States

OCTOBER TERM, 1984

PHILADELPHIA NEWSPAPERS, INC., *et al.*

Appellants,

v.

MAURICE S. HEPPS, *et al.*

Appellees.

BRIEF FOR APPELLEES

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QUESTIONS PRESENTED FOR REVIEW

A.

In a private figure defamation case subject to the rules of *Gertz v. Robert Welch, Inc.*, does the United States Constitution require the Commonwealth of Pennsylvania to impose the burden of proving falsity on the plaintiff?

B.

In view of the fundamental public policy of protecting the sanctity of individual reputation, is it constitutional in a private figure libel case to presume the falsity of defamatory words?

C.

Have the appellants shown a compelling reason to upset the delicate balance struck in *Gertz* between protection of private reputation and freedom of speech, so as to justify the engrafting of a new constitutional restriction on the private figure defamation law of the individual states?

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COUNTERSTATEMENT OF THE CASE

This is a private figure libel action by Maurice Hepps ("Hepps"), General Programming, Inc. ("GPI") and a number of other independent corporations against Philadelphia Newspapers, Inc. ("PNI"), the publisher of *The Philadelphia Inquirer* ("*Inquirer*"), and two of its reporters, William Ecenbarger ("Ecenbarger") and William Lambert ("Lambert"). Hepps was the co-founder of GPI, which franchised beer and beverage distributorships known as Thrifty Beverage, and later as Brewers' Outlet, to the other corporate plaintiffs.

1. *Background of Thrifty Beverage*

Hepps, a native of western Pennsylvania, grew up in the beer distribution business, which he learned from his father.

(Tr. 2097.)*Historically in Pennsylvania, which has very restrictive liquor laws, a consumer could buy cases of beer only from licensed distributors who operated small outlets in out-of-the-way, disfavored locations. (Tr. 2099.) While in the Army, Hepps had been stationed in California and Chicago, where he saw self-service beer stores located in shopping centers. Upon his return to civilian life, he decided to develop this innovative concept in his home state. (Tr. 2098.) After his first store was successful, he started a company to franchise beer stores in shopping centers, to lease stores, and to teach people the beer business. (Tr. 2100.) With a few partners, he created Keystone Leasing Company at the end of 1958 and put his plan into operation. (Tr. 2101.) By 1961, Hepps' partners had dropped out of the business, and he was the sole owner. (Tr. 2103.) Keystone Leasing was not particularly successful (Tr. 2103), but through its operations he met William Paulosky ("Paulosky") who owned the Columbia Brewing Company in Shenandoah, Pennsylvania, and they became good friends. (Tr. 2106.) In 1967, Hepps decided to experiment. He and Paulosky formed Realty Research and Development Corp. They began to buy land, build supermarket-type buildings, and stock snacks and soft drinks in addition to beer. (Tr. 2105-2107.) After the first few stores prospered, they began to get inquiries from other distributors, who asked for help in converting their old-style stores to this new concept. In 1969, Hepps and Paulosky formed General Programming, Inc., to establish a chain of franchised beer distributorships with a common name. (Tr. 2108.) This had never been done in Pennsylvania before, but the idea was successful, and the chain grew rapidly. (Tr. 2111.) Hepps submitted the form management agreement and the proposal to operate all the stores under the name "Thrifty Beverage" to the Pennsylvania Liquor Control Board ("PLCB"), and received its approval. (Tr. 2112-13.)

As the chain achieved success, opposition quickly arose from the entrenched distributors, who for years had secret

*Portions of the trial transcript are consecutively numbered, while others are not. Those portions that are will be cited "Tr. (page)." The portions not consecutively numbered will be cited "Tr. (date) at (page)."

agreements among themselves fixing the minimum prices for each brand of beer in each county. (Tr. 2114.) Because of their new method of operation, the Thrifty stores were able to sell well below the fixed prices, and the franchisees refused to accede to the demands of the distributors' organizations that they abide by the price-fixing agreements. (Tr. 2114-15). As a result, the wholesale distributors boycotted the Thrifty stores, which then could get no beer locally. (Tr. 2115.) During that time, the stores stayed in business only by purchasing beer from Paulosky's distributorship. (Tr. 2116.) Hepps appealed to the United States Department of Justice, Antitrust Division, in Philadelphia, which was able to break the boycott in the counties in the Philadelphia area after a few months. In other counties, such as York in central Pennsylvania, the boycott lasted four years. (Tr. 2117-19.)

The distributors' organizations did not stop there. They caused to be introduced in the Pennsylvania General Assembly and lobbied heavily for several bills that would have given express legislative sanction to their secret price-fixing agreements, and which would have cost Pennsylvania beer consumers approximately $100 million per year. (Tr. 2141-42.) Hepps went to Harrisburg and testified, along with many consumer groups, before several committees in opposition to those bills. In Harrisburg, Hepps talked to numerous state senators and representatives, one of whom directed him to Senator Frank Mazzei. (Tr. 2155.) He and Paulosky met with Senator Mazzei and reviewed many facts and figures with him. Ultimately, Senator Mazzei supported the effort to defeat these bills, in part because the Duquesne Brewing Company, which was located in his district, also opposed them. (Tr. 2155-57.) The bills were ultimately defeated. (Tr. 2143-46.)

After the distributors' organizations lost the legislative battle, they enlisted the support of Alexander Jaffurs ("Jaffurs"), the chief counsel of the PLCB, in their continued effort to force Thrifty to toe the "price-fixing" line. (Tr. 2187-89.) Jaffurs instituted legal proceedings against three Thrifty stores to declare its franchising arrangements illegal under state law. (Tr. 2227-28.) These proceedings resulted in a ruling by the Court of Common Pleas of Lancaster County that

the franchising agreement violated state liquor laws in several respects, which the court described in its opinion, and ordered the licenses of the three distributorships suspended until the agreements were brought into compliance with the law. (Ex. P-35; Tr. 460, 3232-33.) Throughout these proceedings, Hepps sought to meet with Jaffurs to negotiate a settlement. Jaffurs, however, steadfastly refused to meet with him, although he met regularly with representatives of the distributors. (Tr. 2151-53.) This continued until Senator Mazzei, at Hepps' request, asked Jaffurs to meet with Hepps. (Tr. 2154, 58.) Several meetings were then held, the upshot of which was an agreement on all of the terms of a settlement which would have brought the franchising agreements into compliance with the law, in return for which Jaffurs would agree to recommend to the PLCB that the penalty of license suspensions previously imposed be modified to $1,000 fines. (Tr. 1990-91, 2159-65, 2185-86, 2431-43.) The only remaining sticking point was that Jaffurs insisted, at the request of the distributors' organizations, that the chain abandon the use of the Thrifty Beverage name. Hepps was unwilling to do this. Finally, Jaffurs indicated he might be willing to drop this point in order to finalize the settlement. (Tr. 2163-65, 67, 80, 90, 2273.)

However, before the settlement could be concluded, and for totally unrelated reasons, Jaffurs was fired by the Governor, and was replaced as counsel for the PLCB by Harry Bowytz, who had been recommended by Senator Mazzei, among others. (Tr. 2232, 3188, 3193.) Hepps had nothing at all to do with Jaffurs' firing (Tr. 2178), and did not know Bowytz. (Tr. 2122.) Hepps then renewed his negotiations with the PLCB through Sidney Simon, the PLCB attorney who had actually tried the Lancaster County lawsuit. Ultimately, Hepps and Simon reached an agreement which was identical to the one tentatively reached with Jaffurs, except that Simon insisted, and Hepps finally conceded, that the Thrifty Beverage name be abandoned. (Tr. 1989-95, 2184, 2225, 2239, 2272-74.) This agreement received the final approval of the PLCB in January, 1975. (Tr. 2236.)

In the interim, Senator Mazzei was indicted and convicted for extortion in a totally unrelated matter. (Tr. 2256.) Other facts, which neither Hepps nor Paulosky ever tried to conceal or deny, were that Paulosky was a personal friend of Joseph Scalleat, that Scalleat had in the past worked for Paulosky in a business venture unrelated to the Thrifty chain, that Scalleat was acquainted with Senator Mazzei, and that Joseph Scalleat's nephew, Albert Scalleat, Jr., a former accountant for General Motors, managed one of the Thrifty Beverage distributorships. (Tr. 2200, 2264-65, 2289-90, 2687-89, 2702-03.) In addition, although neither Hepps nor Paulosky knew this, Joseph Scalleat had been described in the 1970 report of the Pennsylvania Crime Commission as an organized crime figure, despite the fact that he had no criminal record and the office of the United States Attorney in Philadelphia had serious doubts about his involvement with organized crime. (Tr. 2267, 2689-90, 3446.)

2. *The Articles in Suit*

Against this background, *The Philadelphia Inquirer*, in a series of five articles published between May 5, 1975 and May 2, 1976, through the difficult-to-refute means of guilt-by-association, painted Thrifty with the broad brush of "ties" to organized crime. (Tr. 2251.) The *Inquirer* thereby accomplished through the press what the distributors' organizations had been unable to achieve in any other way—the effective destruction of the Thrifty chain. (Tr. 2292-2303.)

The *Inquirer* developed the theme that the Thrifty chain was infiltrated by the Mafia as follows:

> (a) Senator Mazzei, who was a convicted felon, had, while in the Senate, used improper and illegal political influence to allow the Thrifty chain, in which he owned an interest, to continue to do business despite the fact that it was operating in violation of state law;
>
> (b) Senator Mazzei's motivation for protecting the Thrifty chain was not limited to his financial interest, but also extended to the fact that the chain had a variety of ties to the Mafia through Joseph Scalleat and others (and may even have been a Mafia-front organization), and Sen-

ator Mazzei himself was close to or owed allegiance to the Mafia; and

(c) therefore, the Thrifty chain was closely connected with organized crime. (Tr. 2120-21.)

In developing this theme, the *Inquirer* stated unequivocally that "Federal authorities . . . have found connections between Thrifty and underworld figures" (Joint Appendix at A65), that "[f]ederal agents have evidence of direct financial involvement in Thrifty by [Joseph] Scalleat" (Joint Appendix at A72), and that "the Thrifty Beverage beer chain ... had connections itself with organized crime." (Joint Appendix at A80.)

At trial, it developed that the *Inquirer's* conclusion that Thrifty was connected to organized crime was based on a number of alleged reasons, including: (a) the "well-known fact" that the Mafia frequently infiltrates businesses through family members, in this case a nephew, Albert Scalleat, Jr. (Tr. 6/12/81 at 157-58, 6/16/81 at 265, 266, Tr. 1676); (b) Paulosky's friendship with and employment of Joseph Scalleat, who in turn was a friend of Senator Mazzei (Tr. 1670-71); (c) one Morton Hulse, an insurance agent for Hepps, GPI and a few Thrifty stores, and a small stockholder in GPI, was later indicted in connection with an insurance fraud having absolutely nothing to do with Thrifty (Tr. 1673-76, 2207-2213, 2695-97, 2730-31); (d) Louis Crocco, supposedly a crime figure, was the husband of a woman who owned a 25% interest in one of the Thrifty stores (Tr. 1677, 2219); and (e) unnamed "federal investigators" had other unspecified evidence of ties between Thrifty and organized crime. (Tr. 1657, 1698-99.)

In researching and writing the articles, the *Inquirer's* reporters never interviewed Hepps or Paulosky despite their offers to meet with the reporters, or gave them an opportunity to respond to the allegations published. (Tr. 2135, 39, 48, 2275, 88-89, 2698.) This was apparently because of their preconceived notion that an organized crime figure would never admit his involvement. (Tr. 6/11/81 at 39, 66, 6/12/81 at 142, Tr. 1639.) On only one occasion did either reporter call Hepps to ask him any questions. That was when Ecenbarger asked Hepps if he had known Harry Bowytz before Bowytz replaced

Jaffurs as PLCB chief counsel. Hepps said no, but also told Ecenbarger about how, *after Bowtyz' appointment*, Hepps had learned, in casual conversation, that it was possible that Bowytz' wife's father had removed his tonsils when he was a child. (Tr. 2132-33.) Ecenbarger, in the first article, totally distorted this conversation to make it appear as if Hepps and Bowytz were old friends. (Tr. 2134-35, 2233.)

3. *The Trial Testimony*

Plaintiffs attempted, as best they could, to refute the sting of these articles. They did so with evidence tending to show (a) that they were *not* connected with organized crime, (b) that they were *not* operating in violation of state law, and (c) that Senator Mazzei had *not* used improper political influence to keep them in business, and had no financial interest in Thrifty. (*See, e.g.*, Tr. 2120-22, 2132-35, 2136-2251, 2253-56, 2258-74, 2278-86, 2288-90, 2291-92, 3204-06.) They also directly denied the accusations. (*See, e.g.*, Tr. 2291-92.) For example, Hepps testified that, despite the extensive governmental investigations of his company, neither he, GPI nor any of the stores was ever indicted for anything, and, in fact, an IRS audit for the years 1972-1981 ended with a finding that the government owed GPI $278.00. (Tr. 2304-06.)

The difficulty in disproving the accusations, made in a major metropolitan newspaper, of ties to the Mafia through guilt-by-association, particularly where the associations were not denied, but only the guilt, was particularly illustrated by the statements in the article that "[f]ederal authorities ... have found connections between Thrifty and underworld figures" (Joint Appendix at A65) and that "[f]ederal agents have evidence of direct financial involvement in Thrifty by [Joseph] Scalleat." (Joint Appendix at A72.) Plaintiffs had to try to refute these allegations in the face of the fact that the reporters, relying on the Pennsylvania Shield Law, 42 Pa. Cons. Stat. Ann. §5942(a), refused to identify those federal sources. Indeed, Ecenbarger and Lambert refused to answer questions based on the Shield Law at least 20 times during the trial (*See, e.g.*, Tr. 6/11/81 at 28, 6/12/81 at 151-59, Tr. 14, 16, 110, 111,

230-31, 254, 441-42, 524-32, 580, 1547, 1628-31, 1657, 1662-63, 1666-67, 1671, 1676, 1691-92, 1699-1700, 1767-68, 3358), and were upheld in so doing by rulings of the trial court. (Tr. 6/12/81 at 160; Joint Appendix at A26, *et seq.*) Not knowing who the federal investigators were, plaintiffs could not ask them if they actually had such evidence about Thrifty, or if they had told the reporters that they did.

In addition to upholding the reporters' refusal to identify confidential sources, the trial judge denied plaintiffs' request that he give some sort of adverse inference instruction to the jury, on the ground that to do so would undercut the Shield Law. (Joint Appendix at A144.)

There is no doubt that there was much evidence presented at trial concerning the truth or falsity of the "sting" of the articles just as there was considerable testimony relating to the reporters' negligence in investigating the facts. Ultimately, the trial judge instructed the jury that the plaintiff had the burden of proving both that what had been written was false and that the reporters were negligent. With these instructions, the practical effect of which was that the jury was told to presume that the plaintiffs were guilty of the *Inquirer's* public accusations unless they could prove their innocence, the jury returned a verdict for the defendants.

SUMMARY OF ARGUMENT

The ruling requested by appellants that, in private figure defamation cases subject to the holdings of *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974), the Constitution requires that the plaintiff have the burden of proving falsity, if adopted by this Court, would be a complete reversal of the rule that has obtained throughout history. Even where falsity has been considered an element of the cause of action, there are no common law precedents which require the plaintiff to prove falsity. Nor is such a rule compelled by or necessarily implied from any prior decision of this Court.

A private individual's right to preserve the sanctity of his reputation is a basic of our constitutional system and is of equal constitutional magnitude to freedom of speech and the press. Therefore, the presumption that defamatory speech is

false, which derives directly from this fundamental policy, does not offend the Constitution. There is neither any evidence nor any compelling reason to believe that this presumption has, in the past, resulted or will, in the future, result in undue self-censorship.

The delicate balance between the equally fundamental rights of individual private reputation and free speech would be upset if a new constitutional rule requiring a plaintiff to prove falsity were imposed. Instead, the States should be left free to develop rules which, considering each State's unique matrix of relevant constitutional provisions, statutes and common law experience, best strike that balance, provided only that they do not impose liability without fault, presume damages, or award punitive damages absent actual malice. Among the rules which should be left to the States is whether the burden of proving falsity should be shifted to the plaintiff or, as it has been for nearly a millenium, whether the burden of proving truth should remain on the defendant. The Court should not impose a uniform rule on the States in private defamation cases where, consistent with *Gertz*, the Constitution does not require it to do so.

ARGUMENT

I. NEITHER THE COMMON LAW NOR ANY PRIOR DECISION OF THIS COURT HAS REQUIRED A PRIVATE FIGURE DEFAMATION PLAINTIFF TO PROVE THAT THE DEFAMATORY PUBLICATION WAS FALSE

Let there be no doubt—the constitutional rule which appellants are requesting this Court to adopt would represent a 180-degree reversal from the common law and statutory rules which were in effect in substantially every jurisdiction in the nation prior to *Gertz v. Robert Welch, Inc.*, 418 U.S. 323 (1974). It was neither expressly nor impliedly mandated by *Gertz*. It is a further effort by the organized media to have the Court overturn centuries of precedent in order to erect a new hurdle in the already obstacle-filled path of the private figure libel plaintiff who seeks to vindicate his reputation.[1] To the extent that the briefs of appellants or their *amici* state otherwise, they are wrong. To the extent that their arguments proceed from that erroneous premise, they are without foundation.

An overview of the history of truth as a defense to defamation actions and a review of the *Gertz* opinion establish that placing the burden of proving falsity on a private defamation plaintiff is neither historically justified nor constitutionally mandated.

A. The History of Truth as a Defense Shows That The Plaintiff Was Never Expected To Prove Falsity.

Truth as a *defense* to civil defamation has long-standing

1. *See, e.g., LDRC Jury Project: Preliminary Report on State Pattern Jury Instructions Reveals Serious Deficiencies in Coverage,* Libel Defense Resource Center Bull. No. 10, 1, 7 (Spring, 1984). The Libel Defense Resource Center ("LDRC") describes itself as "an information clearinghouse organized by leading media groups to monitor and study developments in libel and privacy litigation. Supporting organizations include leading publishers and broadcasters, media and professional trade associations representing newspaper, magazine and book publishers, broadcasters, journalists, authors, news directors and newspaper editors, and libel insurance carriers." LDRC Bull. No. 11, 37 (Summer-Fall, 1984).

historical antecedents.[2] By the thirteenth and fourteenth centuries, actions for defamation were relatively common in the English manorial courts, where a defendant was permitted to plead and prove that his statements were true. *Veeder I, supra,* at 549 n.4; *Donnelly, supra,* at 102-03. Similarly, the ecclesiastical courts, which until the end of the 16th century exercised substantial jurisdiction over what was called *"diffimation,"* appear to have adopted the rule of Roman law that truth was a defense in those cases where the defamatory words related to a matter appropriate for public information. *Ray, supra,* at 44 n. 6. In the common law courts, a cause of action on the case for words slowly developed, which focused not on the insult itself, but on the damage which it caused to the plaintiff. There, as well, truth was considered a defense. *Donnelly, supra*, at 115.

In the case of *De Libellis Famosis,* 5 Co. Rep. 125 (1606), the Star Chamber discussed the "pernicious effect" inflicted upon society by widely-distributed written derogatory statements, and responded by creating the new crime of libel, which addressed the need to substitute a criminal remedy in place of personal revenge in response to personal insult. Since the crime addressed the form of the derogatory statement (a writing) rather than its substance, the truth of the libel was, for the first time, considered to be "not material."[3] *Veeder I, supra,* at 562-68; *Donnelly, supra*, at 118. Although it is not entirely clear, the viability of truth as a defense to civil libel does not appear to have been affected. *Franklin, supra*, at 790 n.9.

2. The discussion which follows is based on the extensive historical research set forth in Veeder, *The History and Theory of the Law of Defamation,* 3 Colum. L.Rev. 546 (1903) [hereinafter cited as *"Veeder I"*] and 4 Colum. L.Rev 33 (1904) [hereinafter cited as *"Veeder II"*]; Ray, *Truth: A Defense to Libel,* 16 Minn. L.Rev. 43 (1931) [hereinafter cited as *"Ray"*]; Donnelly, *History of Defamation,* 1949 Wis. L.Rev. 99 [hereinafter cited as *"Donnelly"*]; and Franklin, *The Origins and Constitutionality of Limitations on Truth as a Defense in Tort Law,* 16 Stan. L.Rev. 789, 790-805 (1964) [hereinafter cited as "Franklin"]

3. The Star Chamber did allow truth as a defense against spoken defamation. *Donnelly, supra,* at 119.

By 1640, the Star Chamber was abolished. *Veeder I, supra* p.11, at 568. Truth, however, remained unavailable in England as a defense in a prosecution for criminal libel until 1843, when Lord Campbell's Act, Statutes 6 and 7 Vict., Ch. 96, §6, provided that, in criminal libel proceedings, "truth could be given in evidence as a *defense,* when it was alleged and proved that it was published for the public benefit."[4] *Ray, supra* p.11, at 49.

The American colonies resisted the English prohibition of the defense of truth. The rule was successfully challenged in 1735 in John Peter Zenger's defense of a charge of criminal libel in the New York Colony, when the jury returned a general verdict of acquittal despite being instructed by the trial judge that it could not consider the truth of the defamatory publication. After the Revolution, the English rule met with increasing disfavor. The Pennsylvania Constitution of 1790, at art. 9, §7, provided that "in prosecution for the publication of papers investigating the official conduct of officers, or men in public capacity, or where the matter published is proper for public information the truth of the matter may be given in evidence." Like provisions were inserted in the constitutions of Kentucky, Tennessee and Ohio. New Jersey enacted a similar statute in 1799, as did New York in 1805 and Massachusetts in 1827. Even the infamous Sedition Act of 1798, ch. 74, 1 Stat. 596 (1845), allowed the defense of truth. *Ray,* at 46-7.

The New York statute, 1805 N.Y. Laws, ch. 90, § II, was the direct result of the landmark oral argument of Alexander Hamilton for the defense in *People v. Croswell,* 3 Johns. Cas. 337 (N.Y. 1804). Hamilton contended that the "ancient precedents" made falsehood "the essence of the crime" of libel. *Id.* at 343. From that, he argued that the defendant should have been "enabled . . . to procure testimony, *to prove the truth* of the libel." *Id. Even though Hamilton had established that falsehood was a material ingredient of the crime of libel, he never argued that the state should have been required to prove falsity.*

4. Emphasis added in all quotations throughout this brief unless otherwise noted.

There is evidence that the Star Chamber rule made some inroads on the civil side as well. But truth appears to have been well re-established as a defense in civil suits by the 19th century, both in England and in the vast majority of American courts. *Ray, supra* p.11, at 50-53; *Franklin, supra* p.11, at 800. In some jurisdictions, however, truth was only a defense if coupled with proof that it was published with good motives or for just cause, because "where a man has retrieved his reputation by a long course of good behavior, it is at least morally wrong for one who knows of the past delinquencies to blast a reputation which has been fairly earned." *Veeder II, supra* p.11, at 39 n.3; *see also, Ray,* at 61-69; *but see, Franklin,* at 806-08. By 1931, when the *Ray* article was published, truth was either a partial or complete defense in substantially all American jurisdictions. *Ray,* at 47-8.

This brief historical review shows that truth has long been a defense to civil and criminal charges of defamation. What makes this review relevant to the case at bar is that, despite this long-standing recognition that falsehood is a material ingredient of defamation, not one single case, statute, or constitutional provision can be pointed to which held, prior to *Gertz,* that the burden of proving the falsity of the defamatory words was or should be on the plaintiff.

B. Prior United States Supreme Court Decisions Do Not Require The Plaintiff To Prove Falsity.

Since this is a private figure libel case, the reasoning and rationale underlying *New York Times v. Sullivan,* 376 U.S. 254 (1964), founded as it is in "[t]he right of free public discussion of the stewardship of public officials," 376 U.S. at 275, is inapplicable. Therefore, whether or not *New York Times* requires that a public figure plaintiff bear the burden of proving falsity[5] is not an issue which need be resolved on this appeal. Rather, the analysis must focus upon the *Gertz* opinion. Appellants

5. Compare *Goldwater v. Ginzburg,* 414 F.2d 324, 338 (2d Cir. 1969), *cert. denied,* 396 U.S. 1049 (1970) (public figure plaintiff must prove falsity) with *Corabi v. Curtis Publishing Co.,* 441 Pa. 432, 455, 273 A.2d 899 (1971) (even in a public figure case, burden of proving truth remains on defendant).

argue (Appellants' Brief at 18) that "[t]he inescapable conclusion is that *Gertz* implicitly placed responsibility for proving falsity on the plaintiff . . . ." *Gertz* did nothing of the sort.

To determine the meaning of *Gertz*, one must consider what the Court expressed to be the issue before it, what it described as its holding, and what it said it sought to accomplish with that holding. As Justice Powell stated the question:

> The principal issue in this case is whether a newspaper or broadcaster th t publishes defamatory falsehoods about an individual who is neither a public official nor a public figure may claim a constitional privilege against liability for the injury inflicted by those statements.

418 U.S. at 332. After reviewing the history of recent Supreme Court decisions, Justice Powell addressed the issue with this comment:

> We begin with the common ground. Under the First Amendment there is no such thing as a false idea . . . . But there is no constitutional value in false statements of fact. . . . They belong to that category of utterances which "are no essential part of any exposition of ideas, and are of such slight social value as a step to truth that any benefit that may be derived from them is clearly outweighed by the social interest in order and morality."

Id. at 340. Notwithstanding this "common ground," Justice Powell then stated that the current status of the law, which was tantamount to strict liability absent proof of truth, would not do:

> Allowing the media to avoid liability *only* by proving the truth of all injurious statements does not accord adequate protection to First Amendment liberties.

Id. The Court thus recognized that "[t]he First Amendment requires that we protect some falsehood in order to protect speech that matters." *Id.* at 341. However, the Court then immediately recalled Justice Stewart's statement in *Rosenblatt v.*

Baer, 383 U.S. 75, 92 (1966) (concurring opinion), of the sanctity of individual reputation:

> [T]he legitimate state interest . . .[in] the individual's right to the protection of his own good name reflects no more than our basic concept of the essential dignity and worth of every human being—a concept at the root of any decent system of ordered liberty. The protection of the private personality, like the protection of life itself, is left primarily to the individual states under the Ninth and Tenth Amendments. But this does not mean that the right is entitled to any less recognition by this Court as *a basic of our constitutional system.*

Gertz, 418 U.S. at 341.

The juxtaposition of these two comments shows that the Court saw as its task the striking of a proper balance between the two fundamental rights of protection of reputation and freedom of press. The Court then discussed the balance that had previously been struck in public official-public figure cases. The Court took pains to note:

> We think that these decisions [*New York Times v. Sullivan* and *Curtis Publishing Co. v. Butts*] are correct, but we do not find their holdings justified solely by reference to the interest of the press and broadcast media in immunity for liability. Rather, we believe that the *New York Times* rule states *an accommodation* between this concern and the limited state interest present in the context of libel actions brought by public persons.

Id. at 343. Justice Powell then analyzed the difference between public and private figures, and concluded from that analysis that since the "state interest in protecting [private individuals] is . . . greater," the *accommodation* between the conflicting interests should be struck differently. *Id.* Harking back to the notion that the Ninth and Tenth Amendments left the protection of private personality primarily to the States, Justice Powell stated:

> [W]e conclude that the States should retain *substantial* latitude in their efforts to enforce a legal remedy for de-

famatory falsehood injurious to the reputation of a private individual.

Id. at 345-46.

From all of this, the Court then announced its *holding:*

> We hold that, so long as they do not impose liability without fault, the States may define for themselves the appropriate standard of liability for a publisher or broadcaster of defamatory falsehood injurious to a private individual. This approach provides a *more equitable boundary* between the competing concerns involved here. It recognizes *the strength of the legitimate state interest* in compensating private individuals for wrongful injury to reputation, yet shields the press and broadcast media *from the rigors of strict liability* for defamation.

Id. at 347-48.

In short, the whole thrust of *Gertz*, as stated many times by Justice Powell, was that of *accommodating two fundamental societal interests.* In so carefully crafted an opinion as *Gertz*, if it was the Court's intention, as a matter of constitutional law, to shift the burden of proving truth or falsity—a shift which would have had a major effect on the accommodation which was the whole purpose of the opinion—that intention would have been explicitly stated.[6] As one commentator noted in remarks directed to the *New York Times* holding, but which are equally applicable to *Gertz:*

> The conclusion that the affirmative defense of truth was neither abolished nor its burden shifted to the plain-

6. In the past, when this Court has intended to modify common law rules of libel, it has always been quite explicit. For example, when the Second Circuit Court of Appeals held that two recent Supreme Court cases had implicitly created an absolute "editorial privilege," the Court retorted:

> It is incredible to believe that the Court in *Columbia Broadcasting System* or in *Tornillo* silently effected a substantial contraction of the rights preserved to defamation plaintiffs in *Sullivan, Butts,* and like cases.

Herbert v. Lando, 441 U.S. 153, 168 (1979).

> tiff comports with centuries of recognition by the common law that defamation defendants have two defenses—truth and privilege. If the Court meant to meddle with the former as well as modify the latter, it would certainly have been more specific.

Eaton, *The American Law of Defamation through Gertz v. Robert Weich, Inc. and Beyond: An Analytical Primer,* 61 Va. L.Rev. 1349, 1382 (1975). Similarly, Professor Randall P. Bezanson has said:

> Some courts have held that proof of actual falsity is a constitutional requirement in defamation cases.... The weight of authority is the other way, however, and this seems to represent a better reading of the Court's decisions....

Bezanson, *Fault, Falsity and Reputation in Public Defamation Law: An Essay on Bose Corporation v. Consumers Union,* 8 Hamline L.Rev. 105, 106 n. 6 (1985).

Those who argue that *Gertz* did shift this burden of proof often rely heavily on footnote 10 of the Court's opinion. 418 U.S. at 347. However, all that footnote does is reject Justice White's view that if a defendant cannot prove truth, he must be liable because he could never be without fault "in any meaningful sense." The footnote relates very closely to the Court's earlier comment that "[a]llowing the media to avoid liability *only* by proving the truth of all injurious statements does not accord adequate protection to First Amendment liberties." 418 U.S. at 340. Indeed, footnote 10, by rejecting Justice White's view, illustrates that the majority did *not* consider it necessary to impose upon the plaintiff the burden of proving falsity. It emphasizes that, although the Court felt that a defendant retained the ability to plead and prove truth as a complete defense, that protection alone was inadequate to accommodate the competing interests that were present. To bring the scales into proper balance, the Court added one more element—proof of fault.

The conclusion that *Gertz* did not, either directly or by implication, create a constitutional rule that a private figure

defamation plaintiff must prove falsity is buttressed by reference to one prior, and several subsequent, libel decisions of this Court.

The prior decision is *Rosenbloom v. Metromedia, Inc.*, 403 U.S. 29 (1971), which also arose under Pennsylvania law. While the plurality opinion in *Rosenbloom* was later explicitly rejected for a less stringent standard of liability in *Gertz*, the predecessor of the very Pennsylvania statute which is at issue here was quoted in full by Justice Brennan in that opinion, together with the comment that "Pennsylvania has also enacted verbatim the Restatement's provisions on burden of proof, which place the burden of proof for the affirmative defenses of truth and privilege upon the defendant." *Id.* at 38. Significantly, there is nothing in that opinion to indicate that the plurality considered Pennsylvania's statutory allocation of the burden of proving truth to be unconstitutional.

This reading of the *Rosenbloom* plurality opinion finds further support in Justice Harlan's dissent, the reasoning of which ultimately found expression in the *Gertz* majority opinion. Justice Harlan stated:

> I think we all agree on certain core propositions.... Third, although libel law provides that truth is a complete defense, that principle, *standing alone*, is insufficient to satisfy the constitutional interest in freedom of speech and press.

Id. at 64. In other words, there was nothing wrong with the traditional rule that truth is a defense, but that rule alone was just not enough to satisfy constitutional requirements. Justice Harlan also noted "I do not think it can be gainsaid that the States have a substantial interest in encouraging speakers to carefully seek the truth before they communicate...." *Id.* at 70.

Less than one year after *Gertz*, this Court decided, in *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975), that the Constitution requires that "the publication of truthful information contained in official court records open to public inspection" be a defense to the common law cause of action for invasion of privacy. *Id.* at 495. In a majority opinion written

by Justice White, the pertinent portions of which were joined in by Justices Brennan, Stewart, Marshall and Blackmun, the Court resisted the media's urging to adopt a "broad holding that the press may not be made criminally or civilly liable for publishing information that is neither false nor misleading but absolutely accurate, however damaging it may be to reputation or individual sensibilities," *id.* at 489, and stated instead that:

> [t]he Court has nevertheless carefully left open the question whether the First and Fourteenth Amendments require that truth be recognized as a defense in a defamation action brought by a private person as distinguished from a public official or public figure.

Id. at 490. If, in a private figure libel case, the Court has not even decided whether the Constitution requires that truth be recognized as a defense, it follows that it certainly has not decided that falsity is a constitutionally required element of the cause of action of libel, the burden of proof of which must be placed upon the plaintiff.[7]

One year later, the Court decided *Time, Inc. v. Firestone*, 424 U.S. 448 (1976). One of the defenses raised by Time, and vigorously pressed by it before this Court, was the defense of truth. Time argued that "its report of [the Firestone] divorce was factually correct." *Id.* at 457-58. The Court rejected that defense because the jury, under an instruction which made truth a complete defense and which placed the burden of proving truth on the defendant,[8] had found that the news arti-

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7. Justice Powell, in a concurring opinion, stated his view that truth must be considered a complete defense in cases subject to *Gertz*. 420 U.S. at 497. But he did not state, or even imply, that the Constitution therefore requires that a private figure libel plaintiff be saddled with the burden of proving falsity.

8. The jury was instructed as follows:

> I instruct you that there can be no recovery in this case if you find *from the greater weight of the evidence* that the article as published had no different effect than the divorce judgment in the case of *Firestone v. Firestone*, Case No. 64 C 2790C.

Firestone v. Time, Inc., 305 So.2d 172, 177 (Fla. 1974).

cle was not true. Both the Florida Supreme Court and this Court thereafter ruled there was ample support in the record for this factual finding. *Id.* at 458-59. If the Court felt that the Constitution required that the burden of proving falsity has to be on the plaintiff, it could not have sustained this jury finding because it would have been based upon an unconstitutional allocation of the burden of proof.

Against the substantial weight of this authority and the explicit statement in *Cox Broadcasting* described above, appellants make three demonstrably weak arguments purporting to show that the Court has already decided that a private figure libel plaintiff must, by constitutional fiat, prove falsity. First, they argue that the constitutionally-mandated fault requirement of *Gertz* "necessarily embraces falsity." (Appellants' Brief at 21.) That argument was rejected by the Pennsylvania Supreme Court for the obvious reason that fault, or negligence, is an objective standard which focuses on the manner in which the information was gathered, regardless of its truth or falsity.[9] (Joint Appendix at A172 n.13.) It does not require a subjective inquiry into the reporter's state of mind or awareness of probable falsity, as might the "actual malice" standard. See, *Bose Corp. v. Consumers Union of United States, Inc.*, 466 U.S. ____, 104 S.Ct. 1949 (1984). Even if one were to accept appellants' argument that falsity is the "logical predicate" to a finding of fault (Appellants' Brief at 21) an evidentiary presumption of falsity is not logically inconsistent with a constitutional requirement that fault must be an element of plaintiff's case in chief. "[T]here is no inconsistency in assuming falsity until defendant publisher proves otherwise and requiring the plaintiff to prove negligence or recklessness with respect to the truth or falsity of the imputation."

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9. For example, a reporter, with absolutely no supporting information whatsoever, could write that a local landowner bribed a zoning officer to obtain a variance. Such a story would be defamatory of the landowner because it accused him of a crime. In publishing the story without any supporting information, the reporter certainly would be negligent. But if it turned out that the landowner did in fact pay the bribe, the reporter would have a complete defense—truth. In that case, the reporter would have been negligent, but lucky.

W. Keeton, D. Dobs, R. Keeton and D. Owen, *Prosser and Keeton on the Law of Torts* §116, at 839-40 (5th ed. 1984).

Second, appellants argue that all truthful speech is presumptively protected by the Constitution, and it is impermissible to place the burden on a defendant to prove that his speech is protected. (Appellants' Brief at 26.) In support of the former proposition, they cite *Garrison v. Louisiana*, 379 U.S. 64 (1964), and in support of the latter, they rely upon *Garrison; Speiser v. Randall*, 357 U.S. 513 (1958); *Blount v. Rizzi*, 400 U.S. 410 (1971); *Freedman v. Maryland*, 380 U.S. 51 (1965); and *Near v. Minnesota*, 283 U.S. 697 (1931). In making these arguments, appellants have stretched their precedents far beyond the holdings or intended meanings of the particular cases.

Garrison was a criminal libel prosecution in which the persons defamed were public officials. The Court held that, in such a case, the defense of truth could not be negated by a showing of malice in the sense of ill-will. Instead, the Court said that "[t]ruth may not be the subject of either civil or criminal sanctions where discussion of public affairs is concerned." 379 U.S. at 74. To the extent that this language extends beyond "public officials" or "public figures" to "public affairs," it has since been limited by *Gertz* to public officials or public figures, since *Cox Broadcasting* expressly stated that the issue has not been decided in the case of defamation actions brought by private persons. 420 U.S. at 490. Therefore, appellants' reliance upon *Garrison* to support their premise that truthful speech is presumptively protected by the Constitution in private figure libel cases is misplaced.

However, even if *Garrison* did support that premise, the conclusion which appellants would have the Court draw—that it is unconstitutional to place upon a libel defendant the burden of proving truth—does not follow and is unsupported by precedent. As will be shown below, at 25-29, a majority of the present members of this Court have explicitly said that the right of free speech and the right to the sanctity of individual private reputation are equally compelling under the Constitution. Consequently, if truthful speech is presumptively protected by the Constitution, so is good private reputation. Speech which impugns reputation must therefore create a

clash of *equally strong presumptions*. That clash cannot be resolved by simplistically saying that, since true speech is constitutionally protected, the burden must be on the plaintiff to show that the speech is false, and therefore unprotected. Equal logic supports the converse proposition that, since individual private reputation is constitutionally protected, the burden must be on the defendant to show that the reputation is bad, and therefore unprotected. Absolutes provide no answer to this dilemma. Instead, a balance must be achieved which accommodates both fundamental rights. The *Garrison* court had no occasion to strike that balance because the persons defamed were public officials, and *New York Times v. Sullivan* had already concluded that the right of free speech in criticizing public officials far outweighed individual reputational interests. Therefore, appellants' effort to engraft the holding of *Garrison* on the delicate balance achieved in *Gertz* is both unjustified and unwise.

Speiser v. Randall, 357 U.S. 513 (1958), also relied upon by appellants, is easily distinguishable because that decision pivoted on the fact that an individual's right of free speech was more important than a state's interest in establishing a procedure for claiming a tax exemption. *Id.* at 528-29. As noted above, however, in the case of private figure defamation, the competing interests—free speech and sanctity of individual reputation—stand on *equal constitutional footing*. The remaining cases, *Near v. Minnesota*, *Blount v. Rizzi*, and *Freedman v. Maryland*, involve issues of prior restraint. The body of case law relating to prior restraint obviously has totally different implications, and flows from a different theoretical underpinning, than the law of defamation. See, *In Re Grand Jury Matter*, No. 84-1721, slip op. at 9-10 (3d Cir. June 24, 1985).

Third, appellants argue that the weight of authority in the lower courts has interpreted *Gertz* to hold that the Constitution requires that the plaintiff have the burden of proving falsity. Appellants point to fifteen jurisdictions that have so ruled, as opposed to six, including Pennsylvania, that have ruled to the contrary, and three jurisdictions where the cases appear to conflict. (Appellants' Brief at 19 n.9.) Of course, the disposition of a constitutional issue is not determined by toting up the state and lower federal court decisions on each

side. But certainly these decisions are entitled to respect, and should be examined.

In reviewing these cases, it appears that the highest courts of only twelve states and the District of Columbia have addressed the issue. According to appellants, eight have decided that *Gertz* required that the plaintiff must prove falsity, while five have held, even after *Gertz*, that it was constitutional to place the burden of proving truth on the defendant.[10] Of the eight state high courts which appellants say have ruled that *Gertz* requires the plaintiff to prove falsity, Minnesota and Vermont do not, on review of the *Jadwin* and *Lent* opinions, appear to have so held, the District of Columbia in *Harrison* did not directly address the issue, and Connecticut, Illinois,[11] Montana and Washington seem to have adopted the

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10. The courts which are claimed to have ruled that the plaintiff must prove falsity are: Connecticut: *Goodrich v. Waterbury Republican-Americans, Inc.*, 188 Conn. 107, 448 A.2d 1317, 1322 n.6 (1982); District of Columbia: *Harrison v. Washington Post Company*, 391 A.2d 781, 783 (D.C. 1978); Illinois: *Troman v. Wood*, 62 Ill.2d 184, 340 N.E.2d 292, 299 (1975); Minnesota: *Jadwin v. Minneapolis Star & Tribune Co.*, 367 N.W.2d 476, 491 (Minn. 1985); Montana: *Madison v. Yunker*, 180 Mont. 54, 589 P.2d 126, 133 (1978); Vermont: *Lent v. Huntoon*, 143 Vt. 539, 470 A.2d 1162, 1168 (1983); Virginia: *Gazette, Inc. v. Harris*, 325 S.E.2d 713, 725 (Va. 1985), *cert. denied*, 105 S.Ct. 3513 and 3528 (1985); and Washington: *Mark v. Seattle Times, Inc.*, 96 Wash. 2d 473, 483, 635 P.2d 1081 (1981), *cert. denied*, 457 U.S. 1124 (1982).

Those ruling that the defendant still must prove truth are: Pennsylvania: *Hepps v. Philadelphia Newspapers, Inc.*, 485 A.2d 374 (Pa. 1984); Kansas: *Govin v. Globe*, 229 Kan. 1, 620 P.2d 1163 (1980); Oklahoma: *Martin v. Griffin Television, Inc.*, 549 P.2d 85 (Okla. 1976); Wisconsin: *Denny v. Mertz*, 106 Wis.2d 636, 318 N.W.2d 141, *cert. denied*, 459 U.S. 883 (1982); Tennessee: *Memphis Pub. Co. v. Nichols*, 569 S.W.2d 412 (Tenn. 1978).

11. Interestingly, in *Heinrich v. Illinois*, 104 Ill.2d 137, 470 N.E.2d 966 (1984), *appeal dismissed*, No. 84-1346 (U.S. April 15, 1985), the Illinois Supreme Court concluded, based on its reading of *Cox Broadcasting Corp. v. Cohn*, 420 U.S. 469 (1975), that the Constitution does not require truth to be an absolute defense in a criminal libel action involving a private figure, and therefore upheld a state statute that had been interpreted to place on the defendant the burdens of proving truth, and that the utterance was made with good motives and for justifiable ends. This case raises a serious question as to whether Illinois really does require the plaintiff to prove falsity in a civil libel case.

rule without discussion. Only Virginia, in *Gazette, Inc. v. Harris,* 325 S.E.2d 713 (1985), *cert. denied,* 105 S.Ct. 3513 and 3528 (1985) actually analyzed the issues and concluded that the plaintiff must prove falsity. In short, the authorities are considerably less weighty than appellants' statistics would indicate. And a comparison of the Virginia Supreme Court's opinion in *Gazette* with the Pennsylvania Supreme Court's decision in *Hepps* shows that there are respectable arguments on both sides of the issue of where the burden of proving truth or falsity should be placed. That itself is another reason why, rather than casting this issue in constitutional concrete, it should continue to be left to the States for future experimentation and development.

C. Summary

The preceding analysis of the historical development of truth as a defense and of the decisions of this Court shows that the constitutional rule sought by appellants in this case would be a new rule, without foundation in the common law or prior Supreme Court decisions. The question then becomes whether the Court should upset the balance established in *Gertz* and engraft this new constitutional requirement on the law of libel. It is to this issue that the balance of this brief will be addressed.

II. IN DEFAMATION CASES SUBJECT TO *GERTZ*, THE COURT SHOULD NOT IMPOSE A NEW CONSTITUTIONAL REQUIREMENT THAT THE PLAINTIFF MUST SUSTAIN THE BURDEN OF PROVING FALSITY IN ORDER TO PREVAIL.

A. Appellants' Constitutional Arguments Lack Substance.

Appellants argue that the constitutional balance struck in *Gertz* should be tilted in their favor principally for three reasons: (1) because their "free speech interests" are stronger than the private individual's interest in his own reputation (Appellants' Brief at 28); (2) because the presumption of falsity lacks rationality (Appellants' Brief at 32); and (3) because a rule requiring a publisher to prove truth to escape liability will lead to self-censorship, which is undesirable (Appellants' Brief at 24).[12] None of these arguments can withstand analysis.

(1) *Free Speech and Individual Reputation Are Equal Constitutional Rights.*

In private figure libel cases subject to the holding of *Gertz,* protection of private reputation is a right of equal constitutional magnitude to freedom of speech. The haughty refusal of appellants and their *amici* to recognize this equality undercuts substantially all of their arguments.

Justice Stewart, in language quoted with approval by Justice Powell in *Gertz, supra,* 418 U.S. at 341, and again in *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.,* 53 U.S.L.W. 4866, 4868 (U.S. June 25, 1985) (No. 83-18), characterized the individual's right to the protection of his own good name as "a concept at the root of any decent system of ordered liberty," and "a basic of our constitutional system." *Rosenblatt v. Baer,* 383 U.S. 75, 92 (1966) (concurring opinion). Justice Marshall, in his dissenting opinion in *Rosenbloom v. Metromedia, Inc.,* 403 U.S. 29, 78 (1971), in which Justice Stewart joined, described "[t]he protection of the reputation of such anonymous persons" and "a free and unfettered press" as "two essential and fundamental values." He also stated, *id.* at 81, that "[a] generally applicable resolution is available that promises to provide an adequate balance between the interest in protecting individuals from defamation and the *equally basic interest* in protecting freedom of the press."

Justice Brennan, in *Paul v. Davis,* 424 U.S. 693, 723 n.11

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12. Appellants also argue that it is more fair to require a plaintiff to prove falsity than to have the defendant prove truth (Appellants' Brief at 28, 31), that it is not unfair to require a plaintiff to prove the negative, that is, that the statements about him were not true (Appellants' Brief at 33-35), and that a plaintiff has the best access to information concerning the truth or falsity of assertions about himself (Appellants' Brief at 35-37). But these are all policy arguments properly addressed to the state courts or legislatures. They do not raise issues of constitutional magnitude. *See, infra,* at pp. 42-45.

(1976) (dissenting opinion) said that "the interest in one's good name and reputation ..., when recognized under state law, is sufficient to overcome the specific protections of the first Amendment." And that same year, Justice Rehnquist, in the opinion for the Court in *Time, Inc. v. Firestone*, 424 U.S. 448 (1976), in which he was joined by Chief Justice Burger and Justice Blackmun, described the *Gertz* decision as "a more appropriate accommodation between the public's interest in an uninhibited press and its *equally compelling need* for judicial redress of libelous utterances." *Id.* at 456. In short, Chief Justice Burger and Justices Brennan, Marshall, Blackmun, Powell and Rehnquist have either written or joined in opinions expressly stating that the right to reputation has equal constitutional standing with the right of a free press in private figure defamation cases subject to *Gertz*. Therefore, it ill-behooves appellants to argue that the interest of a private person in protecting his own reputation "does not reach constitutional proportions." (Appellants' Brief at 28.)[13]

There is inestimable, transcendent value in a good name. According to Anthony Lewis, a well-known columnist, "[f]reedom of expression is not the only value involved in libel cases: not for me, at any rate. There is also reputation, a characteristic close to the sense of self—to the integrity of one's personality." Lewis, *New York Times v. Sullivan Reconsidered: Time to Return to "The Central Meaning of the First Amend-*

13. Appellants cite only *Paul v. Davis*, 424 U.S. 693 (1976) to support their contention. *Paul v. Davis* holds merely that defamation of an individual by a government entity, *absent allegations of resulting loss of liberty or property*, does not constitute a deprivation of liberty or property under color of state law so as to require invocation of the procedural due process protections of the Fourteenth Amendment, and therefore does not state a claim under the Civil Rights Act.

The *amicus* brief of Capital Cities Communications, Inc., *et al.*, at 14, adds that "when faced with a claim by a private figure plaintiff involving speech about public affairs, the Court has concluded 'that the state's interest is not substantial relative to the First Amendment interest in public speech.' *Dun & Bradstreet*, 53 U.S.L.W. at 4869 n. 7...." However, at that point in the *Dun & Bradstreet* opinion, the "state interest" to which Justice Powell was referring was the interest in awarding presumed damages, not the broad state interest in protecting reputation.

ment," 83 Colum. L.Rev. 603, 614 (1983). It is a right the protection of which long antedates the Constitution. It is a right that is a "basic of our constitutional system." *Rosenblatt v. Baer*, 383 U.S. 75, 92 (1966) (Stewart, J., concurring). While the right is not explicitly mentioned in the Constitution, and its protection is left primarily to the States, it is no less fundamental than, and is intimately related to, the right of personal privacy. Justice Brandeis, dissenting in *Olmstead v. United States*, 277 U.S. 438, 478 (1928), in addressing the right of privacy, said:

> The makers of our Constitution undertook to secure conditions favorable to the pursuit of happiness. They recognized the significance of man's spiritual nature, of his feelings and of his intellect.... They sought to protect Americans in their beliefs, their thoughts, their emotions and their sensations.

Palko v. Connecticut, 302 U.S. 319, 325 (1937), indicates that rights safeguarded by the First Amendment are "fundamental" or "implicit in the concept of ordered liberty." Justice Stewart used almost the identical words when he spoke of the right to protection of reputation as "a concept at the root of any decent system of ordered liberty." *Rosenblatt*, 383 U.S. at 92. In *Griswold v. Connecticut*, 381 U.S. 479, 484 (1965), Justice Douglas said that "specific guarantees in the Bill of Rights have penumbras, formed by emanations from those guarantees that help give them life and substance." The right of the private person to protection of reputation falls within the penumbra of the various constitutional guarantees which have been deemed to create the right of privacy, most particularly, as the Pennsylvania Supreme Court pointed out below, the presumption of innocence. (Joint Appendix at A158.)

The implications of appellants' contention that the right to freedom of the press outweighs the individual's right to protect his private reputation are particularly troubling. Their argument starts with the proposition that the press serves the public interest as a disseminator of information and opinion which the people will then use to the greater public good. As the public's agent, so the argument goes, the press has "come to think of itself as possessed of a kind of indefinite but powerful

mandate to ferret out and rectify wrongs in the society. . . ." Bollinger, *The Press and The Public Interest: An Essay on the Relationship Between Social Behavior and The Language of First Amendment Theory,* 82 Mich. L.Rev. 1447, 1454 (1984) [hereinafter cited as "*Bollinger*"]. A perfect example of this is reflected in an address delivered by Seymour Topping, Managing Editor of the *New York Times*, to the Judicial Conference of the United States Court of Appeals for the Tenth Circuit in July, 1983, where he said:

> Watergate was only one of the more dramatic examples, of which there are many, in which the press, *as the fourth branch of government,* alerted our society to grave abuse of our democracy when the executive, the legislative and yes, even the judiciary, failed to act with dispatch.

Topping, *First Amendment and The Press,* 100 F.R.D. 85, 86-87 (1983). The press acknowledges its potential for inflicting harm upon individuals, but asserts that the value of the social function it performs reduces the issue of individual harm to relative insignificance.[14]

Traditionally, the press does not follow the logic of its argument beyond this point. But that does not mean that others must likewise abandon the analysis. If the press considers itself as the agent of the people for the purpose of improving the social welfare, it must also acknowledge that it serves at least a semi-official institutional status ("the fourth branch") within our system of government. In our society, all organizations officially charged with exposing wrongdoing are subject to certain limitations on their power, so as to preserve individual rights: witness the presumption of innocence and the privilege against self-incrimination. No one suggests that the press ought to be subject to such official limitations. "The point is simply that there are serious risks of injustice and improper behavior *whenever anyone*[15]—official or unofficial—envisions for themselves a mandate to expose and rectify the

14. See, Franklin, *Good Names and Bad Law: A Critique of Libel Law and a Proposal,* 18 U.S.F. L.Rev. 1, 23 n.105, 25 n.18 (1983). Professor Franklin does not adopt this view, but succinctly explains it.

15. Emphasis in original.

wrongdoing within the society." *Bollinger, supra* p. 28, at 1455. Those risks are minimized by recognizing that the private individual's right to protect the sanctity of his reputation is as important to our freedom as is the institutional role of the press as public servant.

(2) *The Presumption of Falsity Is Constitutional.*

The Pennsylvania Supreme Court concisely explained the rationale for the presumption of falsity of defamatory words:

> The underlying premise concerning the character of the defamed individual is the principle that any man accused of wrong-doing is presumed innocent until proven guilty. The decisions reasoned this principle transcended the criminal law and was equally applicable to the ordinary affairs of life. . . . Based upon this premise we developed the rule that in actions for defamation, the general character or reputation of the plaintiff is presumed to be good. . . . Since the gravamen of defamation is that the words uttered or written tend to harm the reputation, a consequence of the rule presuming the good reputation of the plaintiff was a presumption of the falsity of the defamatory words.

(Joint Appendix at A158.)[16] Appellants assert that the presumption of falsity is unconstitutional because "[p]resumption of a fact without a 'rational connection' to the proven fact violates the Constitution by denying due process or equal protection." (Appellants' Brief at 32.) *See also, Amicus* Brief of ACLU, *et al.,* at 13-14. There are at least three reasons why

16. The Court noted that the presumption of falsity was invoked in libel cases because "although falsity is an element of the cause of action, we have concluded that the burden should be placed upon the alleged defamer to establish the truth of these accusations and will presume it in the absence of proof to the contrary." (Joint Appendix at A160 n.2.) Since the issue here is the constitutionality of a *state statute* allocating the burden of proof, not a common law rule, what the court really meant was that the Pennsylvania General Assembly had made this determination. So the precise issue to be considered is whether the legislatively-created presumption of falsity violates the Constitution.

this argument is without merit.

First, the rule upon which appellants rely is a rule most applicable to the field of criminal law, where the state must bear the burden of proving guilt. "Outside the criminal law area, where special concerns attend, the focus of the burden of persuasion is normally not an issue of federal constitutional moment." *Lavine v. Milne,* 424 U.S. 577, 585 (1976). This is especially so where the presumption is not conclusive, but merely rebuttable. *Manley v. Georgia,* 279 U.S. 1, 6 (1929); *Heiner v. Donnan,* 285 U.S. 312, 329 (1932).

Second, and most important, it is entirely permissible and proper for a presumption to rest upon, and be rationally derived from, an important policy as well as an antecedent fact. The seminal case of *Mobile, Jackson & Kansas City Railroad Co. v. Turnipseed,* 219 U.S. 35 (1910), acknowledged this when the Court said:

> it must be obvious that the application of the act to injuries resulting from "the running of locomotives and cars" is not an arbitrary classification, but one *resting upon considerations of public policy,* arising out of the character of the business.

Id. at 43. The most basic example of this rule is the presumption of innocence. There is no rational connection between the antecedent fact—indictment for a crime—and the presumed fact—innocence of that crime. Indeed, if we assume that an indictment is preceded by the presentation of evidence to a grand jury, and that the grand jury indicts based upon a showing of sufficient evidence, and if we consider the percentage of indicted persons who plead or are found guilty, the presumption of innocence is totally irrational. But as a nation, we have decided that this policy is of overriding importance.

Another example of a presumption based upon policy is the presumption of legitimacy—that a child born in wedlock is the offspring of the mother's husband. In *McMillian by McMillian v. Heckler,* 759 F.2d 1147 (4th Cir. 1985), this presumption was adopted as an element of federal common law because:

> [t]he presumption is one of the most venerable, persistent, and continuously pervasive in the common law.... In variant forms, now frequently codified, it is currently applied in most, if not all, states.... The reason is plain. Though evidentiary in form, it is substantive in its intended effect as a conservator of generally recognized fundamental social values related to the institutions of marriage and family and to the stability and predictability of property interests ....

Id. at 1153.

Again, in the field of labor law, a certified union is presumed under certain circumstances to have the support of a majority of the bargaining unit, subject to proof to the contrary. The Ninth Circuit has approved that presumption, while recognizing that "the basis of the presumption is primarily policy, not probability; it is a vehicle for maintaining industrial peace." *N.L.R.B. v. Tahoe Nugget, Inc.* 584 F.2d 293, 303 (9th Cir. 1978), *cert. denied,* 442 U.S. 921 (1979). *Accord, N.L.R.B. v. Silver Spur Casino,* 623 F.2d 571, 578 (9th Cir. 1980), *cert. denied,* 451 U.S. 906 (1981).

Third, because of the rhetoric surrounding the law of libel in the past twenty years, there has developed a tendency to consider that many of the issues raised in these cases have constitutional implications when in fact they may not. The issue of the burden of proving truth or falsity is an example. The theories behind truth being an absolute defense are founded alternatively in public policy—that the defendant performed a service in bringing an individual's bad character to the attention of the public, or that the court will not, as a matter of policy, reward a person of bad character—or in the simple fact that the plaintiff has excluded himself from recovery by his bad conduct. *Ray, supra* p.11, at 54-57. Under either theory, it could easily be said that, by having committed the acts publicized, the plaintiff "assumed the risk" of publication. The defense of assumption of the risk, which in negligence law has always been the defendant's to plead and prove, does not raise constitutional issues just because the risk assumed is the risk of injury resulting from publication, rather

than from some other cause.

As these cases and arguments show, it is therefore not only constitutional, but entirely right and proper, to presume the falsity of defamatory words from the fundamental individual right to protection of reputation.[17]

(3) *The Fear of Self-Censorship Is Unsupported and Unsupportable.*

Appellants suggest that a rule requiring a publisher to prove truth in order to escape liability will lead to self-censorship.[18] This is the archtypical "straw man" argument. A

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17. *See, e.g., Speiser v. Randall*, 357 U.S. 513, 532-33 (1958) (Douglas, J., concurring):

> The State by the device of the loyalty oath places the burden of proving loyalty on the citizen. That procedural device goes against the grain of our constitutional system, for every man is presumed innocent until guilt is established.

See also, Veeder II, supra p.11, at 33:

> In its vital aspect the right to reputation is not concerned with fame or distinction. It has regard . . . to that repute which is slowly built up by integrity, honorable conduct, and right living. One's good name is therefore as truly the product of one's efforts as any physical possession; indeed, it alone gives to material possessions their value as sources of happiness.
>
> In most cases reputation reflects actual character. Such is the condition which best serves the interests of society, and which the individual may reasonably demand. Since the right is only to respect so far as it is well founded, it is obviously not infringed by a truthful imputation. *But the law justly deems any derogatory imputation false until it is shown to be true.*

18. The *amicus* briefs make this fallacious argument in even stronger terms. Capital Cities Communications, Inc., *et al.*, at 19, describes the issue as shifting the ultimate burden of persuasion on whether speech is constitutionally protected. The American Civil Liberties Union, *et al*, at 11, says that placing the burden of proving truth on the defendant will require him to consider not only the truth of his publication, but whether he can prove it in court. The AFL-CIO, at 7 n.3, calls the decision below a holding that requires the defendant to prove truth to avoid liability. And the Print and Broadcast Media, at 8, go so far as to say that "[a] defamatory statement

(Continued)

publisher never has to prove truth to escape liability. That was the whole point of *Gertz*. When Justice Powell said that "[a]llowing the media to avoid liability only by proving the truth of all injurious statements does not accord adequate protection to First Amendment liberties," 418 U.S. at 340, he acknowledged the Court's sensitivity to these concerns. When he then held that the States could "not impose liability without fault . . .," 418 U.S. at 347, he addressed those concerns and set forth the remedy. But the argument of self-censorship as framed by appellants and their *amici* are made as if *Gertz* had never been decided.

Most of the States have interpreted the fault requirement of *Gertz* to mean negligence. Therefore, all a publisher has to do is show that he reasonably believed that what he wrote was true. Bayer, *Defamation: Extension of the "Actual Malice" Standard to Private Litigants*, 59 Chi.-Kent L.Rev. 1153, 1173 (1983). Indeed, since the publisher does not have the burden of persuasion on this issue, he does not even have to convince the jury—he just needs to leave it equally balanced. *Regardless of the decision in the instant case*, a publisher will never have to prove truth to escape liability unless all of his other defenses, including lack of fault and the various privileges available under state law, have failed.

Furthermore, the fear of self-censorship is not supported by the evidence. In the conclusion of their brief, appellants argue that "[v]igorous debate on public issues should not be stifled by requiring a publisher to bear the burden of proving to a legal certainty each word which is written." (Appellants' Brief at 38.) Leaving aside the hyperbole of this statement, appellants probably meant to argue that, even with the protection of the fault requirement of *Gertz*, freedom of the press will be unduly restricted if a publisher who elects to defend a libel claim based upon actual truth, rather than a reasonable belief

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NOTE 18—*(Continued)*

that is presumed to be false . . . subjects the defendant to liability without any further proof."

Although they do not describe it as such, appellants and their *amici* presumably only object to *undue* self-censorship, and acknowledge that a certain level of self-censorship represents nothing more than responsible reporting. Topping, *supra* p. 28, at 87, 89.

in truth, is put to the task of proving his defense. Other than a repeated lament by the organized media extending back over a number of years, there is no evidence to support this concern. Indeed, the evidence is to the contrary.

In Franklin, *Suing Media for Libel: A Litigation Study,* 1981 Am. Bar Found. Res.J. 795, a study of 291 reported defamation cases between January, 1977 and December, 1980, the author found that the plaintiff obtained a judgment which he was able to sustain on appeal in just 10 cases, a success rate of only 3.4%. *Id.* at 829. The author found that "[a]mong defendants, we noted that not a single broadcaster suffered an adverse judgment—even at the trial stage. . . . [E]ven the print media lost relatively few cases examined in this study." *Id.* at 830. In a later article, Professor Franklin said:

> In all, plaintiffs who sue media defendants ultimately get and keep judgments in five to ten percent of all libel cases, and most obtain relatively small dollar awards. Even adding in settlements,[19] this may be the most dismal performance record for plaintiffs in all areas of tort law.

Franklin, *Good Names and Bad Law: A Critique of Libel Law and a Proposal,* 18 U.S.F. L.Rev. 1, 4-5 (1983). This conclusion is confirmed by the most recent findings of the Libel Defense Resource Center that nearly three out of every four libel cases are dismissed on summary judgment. LDRC Bull. No. 13, 10-11 (Spring, 1985). The LDRC also found that the damage awards which survive post-trial motions and appeals "continue to be relatively small, and even appear on average to be decreasing." *Id.* at 4.[20]

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19. Franklin also cited data from one insurer. Of 118 libel cases closed in 1979, plaintiffs won three judgments, and 30 other cases were settled for payments ranging from $300 to $50,000 with the median payment being $4,500. Franklin, 1981 *Amer. Bar Found. Res.J.*, at 800 n.12.

20. The *Amicus* Brief of Capital Cities Communications, Inc., *et al.*, at 13, quoted statistics that, from 1982-84, five damage verdicts exceeded $1,000,000, and eight exceeded $100,000, citing LDRC Study No. 5, LDRC Bull. No. 11, 16 (Summer-Fall, 1984). What that brief neglected to add was that the same study concluded that "the awards which survive post-trial motions and appeals continue to be relatively small," with no million dollar award finally affirmed on appeal. *Id.* at 3.

On the particular question of self-censorship, Professor Franklin said:

> Certainly, despite adverse legal developments in recent years, investigative reporting is still being done, especially by the large newspapers. If the leaders of the media were to assert that the fear of libel suits and their accompanying expenses had a negative impact on reporting practices, the public would, rightly, be skeptical. In fact, prestigious publishers and broadcasters assert that libel law has not deterred them from practices they think appropriate.
>
> * * *
>
> The problem, then, is that it is virtually impossible to identify the causes of any decrease in investigative journalism or controversial stories. The uncertainty is exacerbated by the absence of examples from members of the press of stories they have killed or not pursued because of concern about being sued for libel.

Franklin, 18 U.S.F. L.Rev. at 15-17.

Moreover, the self-censorship argument is a strange one to be made in the context of allocating the burden of proving truth or falsity. The media's fear of self-censorship arises not from the fear of error, but from the fear of large damage awards, particularly those involving potentially uninsured punitive damages. The issue of the escalating cost of litigation, with its concomitant demands upon the time of the people involved, is only a subsidiary concern, because if the potential for large damage awards were not as great, the amount of money and time spent on defense would be correspondingly reduced. But the presumption of a good reputation, from which follows the presumption of falsity, "does not necessarily have to be translated into any monetary recovery for the plaintiff." LeBel, *Defamation and the First Amendment: The End of the Affair,* 25 Wm. & Mary L.Rev. 779, 785 (1984). The presumption of falsity is not the same as a presumption of damages, which *Gertz* disallowed absent proof of actual

malice.[21]

It thus appears that the media's undocumented fear of self-censorship is belied by the available evidence. While rules which contribute to undue self-censorship certainly should not be looked upon with favor, the absence of empirical data or any other type of proof to support the media's claims is itself evidence that self-censorship is not a serious post-*Gertz* problem. This is particularly so where the available empirical evidence shows that "truth [is] rarely a crucial defense." Franklin, *Winners and Losers and Why: A Study of Defamation Litigation*, 1980 Amer. Bar Found. Res.J. 455, 494. Certainly the evidence is insufficient to induce the Court to further constitutionalize the law of defamation. As Justice White said in *Dun & Bradstreet*, 53 U.S.L.W. at 4873 (concurring opinion), "I cannot assume that the press, as successful and powerful as it is, will be intimidated into withholding news that by decent journalistic standards it believes to be true."

B. Established Constitutional Principles Will Be Best Served by Leaving the Allocation of the Burden of Proving Truth Or Falsity to the States.

The thrust of *Gertz* was that "the States should retain substantial latitude in their efforts to enforce a legal remedy for defamatory falsehood injurious to the reputation of a private individual." 418 U.S. at 345-46. But for the requirement of "fault," and the limitations on damages, the Court has opted to leave to the States the development of the law of private figure defamation. Rejection of appellants' request to impose a constitutional requirement that a private figure plaintiff prove falsity follows naturally from that decision.

(1) *The Example of Pennsylvania*

The wisdom of this decision is well-illustrated by the ex-

21. The confusion of these concepts is reflected in the *Amicus* Brief submitted on behalf of Capital Cities Communications, Inc., *et al.*, at 5-6, where the burden of proof rule at issue in this case is erroneously described as "a rule *permitting damages* for the utterance of speech that is true."

ample of Pennsylvania. This is a Commonwealth whose libel law has not followed the mainstream. Pennsylvania was the first State to provide in its Constitution that truth was a defense to a libel prosecution. Pa. Const. of 1790, art. 9, §7.[22] The Constitution of 1873, in §7 of the Declaration of Rights, extended the protections accorded to the press by excusing the publication of defamatory matter upon a showing that it was proper for public information and not published maliciously or negligently.[23] The requirement of negligence, with the burden of proving it being placed upon the plaintiff, has also applied to Pennsylvania civil defamation actions since at least the late nineteenth century. *Neeb v. Hope*, 111 Pa. 145, 151-52, 2 A. 568, 570-71 (1885); *Clark v. North American Co.*, 203 Pa. 346, 351-52, 53 A. 237, 239 (1902); *Wharen v. Dershuck*, 264 Pa. 562, 566, 569, 108 A. 18, 19-20 (1919); *Summit Hotel Co. v. National Broadcasting Co.*, 336 Pa. 182, 192, 8 A.2d 302, 307 (1939); *Purcell v. Westinghouse Broadcasting Co.*, 411 Pa. 167, 179-81, 191 A.2d 662, 668-69 (1963); *Zerpol Corp. v. DMP Corp.*, 561 F. Supp. 404, 410 n.3 (E.D. Pa. 1983). It was codified by the General Assembly in 1901. 42 Pa. Cons. Stat. §8344 (originally enacted in Act of April 11, 1901, P.L. 74, §3, 12 Pa. Stat. §1583) provides:

22. That provision, which was carried forward without change in the Constitution of 1838, provided in relevant part:

> In prosecution for the publication of papers investigating the official conduct of officers, or men in a public capacity, or where the matter published is proper for public information, the truth thereof may be given in evidence ....

23. The provision in question stated:

> The printing press shall be free to every person who may undertake to examine the proceedings of the Legislature or any branch of government, and no law shall ever be made to restrain the right thereof. The free communication of thoughts and opinions is one of the invaluable rights of man and every citizen may freely speak, write and print on any subject, being responsible for the abuse of that liberty. No conviction shall be had in any prosecution for the publication of papers relating to the official conduct of officers or men in public capacity, or to any other matter proper for public investigation or information, where

(Continued)

> In all civil actions for libel, no damages shall be recovered unless it is established to the satisfaction of the jury, under the direction of the court as in other cases, that the publication has been maliciously or negligently made, but where malice or negligence appears such damages may be awarded as the jury shall deem proper.[24]

At the same time it was extending these protections to the press, Pennsylvania was not ignoring individual reputation. The Constitutions of 1790 (art. 9, §1), 1838 (art. 9, §1), 1873 (art. 1, §1), and 1968 (art. 1, §1) were explicit in protecting "reputation" as an inherent and indefeasible right. The current Pennsylvania Constitution, enacted in 1968, states in article 1, §1 of the Declaration of Rights (the very first paragraph of that document):

> §1. *Inherent Rights of Mankind.*
>
> All men are born equally free and independent, and have certain inherent and indefeasible rights, among which are those of enjoying and defending life and liberty, of *acquiring, possessing and protecting* property and *reputation*, and of pursuing their own happiness.

NOTE 23—(*Continued*)

> the fact that such publication was not maliciously or negligently made shall be established to the satisfaction of the jury; and in all indictments for libels the jury shall have the right to determine the law and the facts, under the direction of the court, as in other cases.

24. By twisting the language of the *Hepps* opinion, the *Amicus* Brief submitted on behalf of Capital Cities Communications, Inc., *et al.* argues that the Pennsylvania negligence standard relates only to negligence in the act of publishing the defamation, and therefore does not meet the *Gertz* standard because it does not relate to fault in determining truth. This argument is completely erroneous. In 1939, the Pennsylvania Supreme Court said in *Summit Hotel Co. v. National Broadcasting Co.*, 336 Pa. at 192:

> a close examination of the Pennsylvania law will show that our rule is not one of absolute liability, but rather, of a very strict standard of care *to ascertain the truth* of the published matter.

Accord, Clark v. North American Co., 203 Pa. at 351 ("[e]ven in reporting an occurrence proper for publication there may be such an absence of the required diligence and care *to ascertain the truth* as to make the report libelous").

§11 of the Declaration of Rights provides:

> All courts shall be open; and every man for an injury done him in his lands goods, person or *reputation* shall have remedy by due course of law ...

Considering these constitutional provisions, it is the law of Pennsylvania that "[t]he rights of the [publisher] and of the [persons] alleged to have been libeled in this case ... rest on the same constitutional ground. They demand an exact balance of the scales of justice...." *Commonwealth v. Swallow*, 8 Pa. Super. 539, 603 (1898).

The other major factor which enters into the unique equation which is the Pennsylvania law of libel is the existence, since 1937, of a very broad Shield Law protecting sources of information. 42 Pa. Cons. Stat. Ann. §5942.[25] This statute has been interpreted very broadly. *In Re Taylor*, 412 Pa. 32, 193 A.2d 181 (1963). As interpreted, the scope of the protection afforded by the Shield Law is solely determined by the reporter; the identity of any source which the reporter does not actually publish or publicly disclose shall remain confidential. *Id.* at 44.

No mechanism exists to limit a reporter's potential abuse of this privilege. The instant action is a case in point. In pretrial proceedings, the trial court ruled that the Shield Law was applicable to civil libel actions, and gave the reporter-defendants the unfettered discretion to refuse to identify any and all sources of information. *Hepps v. Philadelphia Newspapers, Inc.*, 3 Pa. D.&C. 3d 693 (1977).[26] During the trial, the reporters repeatedly exercised that right from the witness stand, all the while relying upon information from those confidential

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25. 42 Pa. Cons. Stat. Ann. §5942(a) provides:

> No person engaged in, connected with, or employed by any newspaper of general circulation or any press association or any radio or television station, or any magazine of general circulation, for the purpose of gathering, procuring, compiling, editing or publishing news, shall be required to disclose the source of any information procured or obtained by such person, in any legal proceeding, trial or investigation before any government unit.

26. The Opinion is reproduced in the Joint Appendix beginning at page A26.

sources to support the truth of their articles. The trial judge, consistent with his pre-trial ruling, did not direct the reporters to answer, thereby giving tacit, if not explicit, approval to their refusal to respond. Plaintiffs accordingly submitted, in the alternative, two proposed points for charge,[27] either of which would have instructed the jury that it could, if it wished, draw inferences adverse to defendants by their failure to identify sources. Plaintiffs argued that the trial court should at least instruct the jury that it need not accept the reporters' assertion of the Shield Law with blind faith; that the jury should itself examine the reporters' claims of privilege in light of all the facts in the case; and that it could conclude that the reporter was not really trying to protect confidential sources, but rather to use the Shield Law to prevent plaintiffs from challenging the existence, reliability and credibility of the sources themselves, because the reporter felt that such a challenge might succeed. However, the trial court refused to give either requested instruction because of its fear that "to charge the jury in such a fashion would effectively emasculate the so-called Shield Law of Pennsylvania." (Joint Appendix at A144.)

In commenting upon the impact of the Shield Law, the Pennsylvania Supreme Court, in its decision in this case, stated:

> As a consequence of this greater protection to the media defendant provided by the "shield law" the plaintiff in a civil libel action is restricted in his ability to prove the falsity of the defamatory statement. He is denied access to the sources of information on which the statement is based.

(Joint Appendix at A175.)

Finally, it is important to remember that the rule that the defendant has the burden of proving truth has been part of Pennsylvania decisional law since at least 1847. *Steinman v. McWilliams*, 6 Pa. 170 (1847).[28] It is a rule that has long blended in with the rules described above, and many others,[29] to complete the matrix of Pennsylvania libel law.

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27. These are reproduced in the Joint Appendix at A92 and A93.

28. See cases cited by the Pennsylvania Supreme Court at Joint Appendix A156.

29. Such as the rule that evidence of the plaintiff's good character or *(Continued)*

Against this background, with intimate knowledge of the unique matrix described above, the Pennsylvania Supreme Court concluded that "[t]he right to criticize must carry some degree of responsibility, particularly where it may jeopardize the reputation of a private citizen." (Joint Appendix at A174.) Having previously concluded, for reasons similar to those stated in Part I of this brief, that *Gertz* does not preclude a State from placing the burden of proving truth on a defendant, the Pennsylvania Supreme Court held that this ancient common law rule, approved by the Pennsylvania General Assembly, when considered in the context of other Pennsylvania rules relating to libel law, including the fact that it co-existed for the better part of this century with a fault requirement and a broad Shield Law, "makes a constitutionally acceptable accommodation between the freedom of expression required by the First Amendment and our law of civil libel for compensatory damages brought by a private individual to redress defamatory falsehood." (Joint Appendix at A172.)

The wisdom of this accommodation is well-illustrated by the case at bar. For example, in the second news article, in a sentence which plaintiff Hepps testified was particularly damning (Tr. 2255-57), defendant Ecenbarger wrote:

> The [Federal] investigators have found connections between Thrifty and underworld figures.

(Joint Appendix at A65.) To prove this statement false, plaintiffs would have to prove:

(a) that the unnamed "underworld figures" were not underworld figures;
(b) that Thrifty had no "connections" with these "underworld figures"; and
(c) that the unidentified "federal investigators" had no evidence, whether good or bad, of these "connections."

Since plaintiffs were denied the right to learn who the federal investigators were, they were doubly hamstrung: they could

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NOTE 29—*(Continued)*
reputation is not admissible until the defendant has attacked it in court. *Clark v. North American Co.*, 203 Pa. 346, 353 (1902).

not question the investigators to see if they indeed had such evidence, and they could not respond to that "evidence" to prove it false. The only way that plaintiffs could sustain their burden of proving falsity was to challenge the credibility of the reporters for refusing to identify those sources. But the trial court eliminated this possibility by refusing to charge the jury concerning the adverse inferences which the jury could permissibly draw from defendants' failure to identify their sources.

In short, the trial court put the burden of proving falsity on plaintiffs but denied to them the means to sustain that burden. Since §11 of the Pennsylvania Declaration of Rights assures that every person "shall have remedy by due course of law" for "any injury done him in his . . . reputation," the combined rulings of the trial court raised serious due process issues under the Pennsylvania Constitution which were argued by plaintiffs in their appeal to the Pennsylvania Supreme Court. Those issues did not have to be reached, however, because of the court's proper conclusion that placing the burden of proving truth on a defendant did not violate the federal Constitution.[30]

(2) *The Historical Rule that the Defendant Has the Burden of Proving Truth Best Serves The Competing Interests of Reputation and Free Press.*

There are numerous social benefits to the traditional rule[31] that the burden of proving truth should be on the defendant, several of which have been adverted to throughout this brief. While, as noted earlier, *supra* n.12, these social benefits are policy arguments which do not raise constitutional issues, they are nonetheless worthy of mention as additional reasons for the Court not to create a constitutional requirement that a plaintiff prove falsity.

30. For a good summary of how, since *Gertz*, several other states have established rules applicable to defamation which consider those states' unique circumstances, *see* Cohen, *Libel: State Court Approaches in Developing a Post-Gertz Standard of Liability,* 1984 Ann. Surv. of Am. L. 155.

31. The *Amicus* Brief of Print and Broadcast Media and Organizations *(Continued)*

The most significant policy reason supporting the traditional rule is that it flows naturally from the presumption of innocence and the importance of protecting the individual and his rights.[32] The basic, fundamental and indeed constitutional stature of the right to protect reputation, equal to the right of freedom of the press, is what distinguishes defamation law from the rule in Title VII cases to which appellants draw an analogy in their brief, at 29-31.[33] A further basis for distinguishing the Title VII cases is that the rule of *Texas Dept. of Community Affairs v. Burdine,* 450 U.S. 248 (1981), is not a rule of constitutional imperative, but only of statutory interpretation. States are, and should be, free to adopt a *Burdine* rule in libel cases if they so choose. But there is nothing in *Burdine,* or in the Title VII analogy, that should constitutionally compel them to do so.

The question of fairness is relatively straightforward. Maurice Hepps awoke one morning, opened his copy of *The Philadelphia Inquirer,* and saw that the leading morning

NOTE 31—*(Continued)*

repeatedly describes this rule as the "Pennsylvania Rule" (*Amicus* Brief at 5, 10, 16-19, 23-25) as if it was a "new element" (*Amicus* Brief at 17) thrust upon the already beleaguered libel defendant. The bulk of its argument proceeds from that assumption. To the contrary, as shown in §1.A of this Argument, the "Pennsylvania Rule" has been a uniform rule of Anglo-American jurisprudence, with the exception of a short period of time in the 17th and 18th Centuries, for close to 1000 years. In fact, this *Amicus* Brief so consistently misstates the law, and overstates its arguments, that the only purpose it serves is to confuse rather than elucidate the issue before the Court.

32. The *Amicus* Brief of the ACLU, *et al.,* at 16, suggests that the presumption of falsity of defamatory statements derives from the common law of libel. However, the Pennsylvania Supreme Court said it derives from the presumption of innocence. (Joint Appendix at A158.) Regardless of the ACLU's denigration of "the common law of libel," it presumably will acknowledge the importance of the presumption of innocence.

33. Appellants' argument based on the analogy to trade disparagement cases, where the burden of proving falsity is on the plaintiff, is also easily distinguishable because the interest in protecting the reputation of one's *product* clearly cannot be equated with the right to freedom of speech. *Young v. Geiske,* 209 Pa. 515, 519, 58 A. 887, 888 (1904). But the case at bar is not trade disparagement, it is libel.

newspaper in the fifth largest city in the country had trumpeted the "fact" that "[federal] investigators have found" that his company, Thrifty Beverage, had "connections" with "underworld figures." (Tr. 2120-21.) In the face of this public accusation, he was confronted with the extraordinary task of proving to the world the amorphous negative proposition that he was not connected with organized crime.[34] Unable to achieve vindication in the *Inquirer*, Hepps was forced to go to court, where he was entitled to expect that he would be given a fair chance to clear his name.

Libel is the tort of wrongful public accusation of wrongdoing. Our society is founded upon the proposition that the accuser must prove the truth of his accusations. Fairness dictates, and Hepps had the right to anticipate, at least that much. Furthermore, especially in view of the broad Shield Law protections available in Pennsylvania and elsewhere, the accuser best knows the facts upon which his accusations are based, and is therefore best able to supply that proof in court. To the extent he has difficulty, modern discovery rules are as available to a libel defendant as they are to a libel plaintiff, and the plaintiff does not have the ability to resist that discovery by invoking a Shield Law privilege.

While British commentary on this issue is not entirely applicable because fault is not a prerequisite to recovery in Great Britain, the Report of the Committee on Defamation, Cmd. No. 5909, Paragraph 141, at 36 (1975), had this to say on the policy considerations involved in shifting the burden of proving truth or falsity:

> Perhaps the most radical suggestion of all made to us was that the burden of proof should be shifted so that a defendant would have a defense unless the plaintiff could disprove the truth of the allegations. We are firmly opposed to this suggestion. We think that the principle requiring a publisher of defamatory words to prove their truth (subject of course to other defenses like qualified privilege) is a sound principle. It tends to inculcate a spirit of caution

34. For examples of the difficulties in trying to prove a negative, see Tr. 2538-39, 2544.

> in publishers of potentially actionable statements which we regard as salutory, and which might well be severely diminished if the burden of proof were shifted. Moreover, such a shift would, we think, severely upset the balance of the law of defamation against defamed persons.

As Justice Brennan recently said in a related context in *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 53 U.S.L.W. 4866, 4878 (U.S. June 25, 1985) (No. 83-18) (Brennan, J., dissenting), "[t]he common law['s] . . . accumulated learning is worthy of respect."

(3) *The Need to Maintain Flexibility.*

There is dissatisfaction with the current state of the law of libel among commentators and interested groups on both sides of the issue. As the *amici* briefs submitted on behalf of appellants in this case indicate, the media feel that, under the present state of the law, they are too exposed to the uncontrolled discretion of juries in awarding substantial damages and, even in those cases where they prevail, they are forced to incur substantial legal fees defending actions that, in their view, ought never to have been filed. Plaintiffs, for their part, despair over the difficulties they have under present law in rapidly and completely vindicating their good names, and the substantial costs they must incur in doing so. As a result, there have appeared in recent years a plethora of proposals for reform, involving the need for new state legislation to modify procedures, to assure speedy trials, to create new forms of action such as a declaratory judgment to establish falsity, and so forth. *See, e.g., Franklin*, 18 U.S.F. L.Rev. at 29, *et seq.*; *LeBel*, 25 Wm. & Mary L.Rev., at 788, *et seq.*; *Lewis*, 83 Colum. L.Rev. at 615-18.

As a corollary, this Court should be loathe to further constitutionalize the law of private figure libel absent a truly compelling showing of need.[35] This is so because each new constitutional requirement means one less area in which the States can experiment with new ways to keep in balance the

35. The unbroken trend of decisions by this Court since *Gertz* has shown agreement with this proposition. *Time, Inc. v. Firestone*, 424 U.S.

(Continued)

competing interests of individual reputation and freedom of the press. No such compelling showing of need has been made by appellants in this case.

NOTE 35—(*Continued*)
448 (1976); *Hutchinson v. Proxmire*, 443 U.S. 111 (1979); *Wolston v. Reader's Digest Association, Inc.*, 443 U.S. 157 (1979); *Dun & Bradstreet, Inc. v. Greenmoss Builders, Inc.*, 53 U.S.L.W. 4866 (U.S. June 25, 1985). *See*, LeBel, at 780-81.

III. CONCLUSION

> Rather than focusing on the federal constitutional limitations on a state's tort law, the next rounds of the defamation debate are likely to resemble the controversy in some other branches of tort law. In these next rounds, the reconciliation of competing interests is going to be made within the constraints of the political process. Rather than subjecting reputational interests to a first amendment trump, the participants in this debate ought to be increasingly responsive to more popular notions of the fair treatment of individuals and the control of largely unchecked institutions capable of inflicting serious harm.

Lebel, 25 Wm. & Mary L.Rev., at 782. These comments are particularly pertinent to the issue raised by this case. From the manorial and ecclesiastical courts of England, through the courts of common pleas, to a colonial courtroom where John Peter Zenger was acquitted, to the newly-formed state courts and legislatures where the aberrations of the Star Chamber were quickly discarded, to today's society of instantaneous worldwide mass communication, the concepts of freedom of speech and the press and the sanctity of individual private reputation have come to be identified as important goals of democracy and freedom. When in our history one has been favored over the other, both have suffered grievously. In England in the 17th Century, when the Star Chamber glorified reputation to the extent that truth became "not material," the free press was completely suppressed, and the individual rights of the common man were sharply restricted. More recently, when public defamation in the name of national security became a way of life, speech was seriously repressed as well. As Justice Stewart said:

> The rights and values of private personality far transcend mere personal interests. Surely if the 1950s taught us anything, they taught us that the poisonous atmosphere of the easy lie can infect and degrade a whole society.

Rosenblatt v. Baer, 383 U.S. at 93-94 (Stewart, J., concurring).

Favoring freedom of the press over individual private reputation by constitutional fiat cannot be what the Framers had in mind. The ruling requested by appellants would fly in the face of hundreds of years of common law experience, of the framework of individual rights protected by the Bill of Rights, of public policy, and of basic notions of fairness. Zenger, after all, did not insist that the Crown prove him false. He asked only for the right to prove that what he wrote was true.

For the reasons stated above, appellees request that the judgment of the Supreme Court of Pennsylvania be affirmed.

Respectfully submitted,

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